Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-471

JOHN W. COLLIS, *Petitioner,*

v.

KENTUCKY BAR ASSOCIATION, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

PETITIONER'S REPLY BRIEF

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November 28, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF

The Respondent's Brief in Opposition needs a short reply.

I

The Respondent concedes (Opp. Br. 7-8) that the Petitioner did raise federal constitutional due process objections to the disbarment procedure before the Court of Appeals of Kentucky. He did so, as the Petition makes clear (p. 9), both in his main brief to that court and in his petition for rehearing. And the Respondent now concedes (Opp. Br. 9) that the "constitutional issues raised by petitioner were an-

swered by the [Kentucky] court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky."

Such a concession is quite proper, for that interpretation and application are precisely why the judgment below must be construed as involving a denial of these federal constitutional claims, thereby supporting the jurisdiction of this Court to review such a denial. The fact that the denial was not express does not detract from that jurisdictional base. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67.

But the Respondent errs in asserting (Opp. Br. 9) that such a response to the federal constitutional claims left "no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court." Resolution of federal constitutional claims of this nature must always involve and rest upon a proper interpretation of the relevant state law. Obviously, indulging in such interpretation does not destroy the federal claims or arguments. It only serves to emphasize that the denial of the federal claims was a necessary part of the decision below.

Moreover, this erroneous argument by Respondent inadvertently serves to expose still another jurisdictional basis for the exercise of this Court's review powers. Since the federal constitutional problems, as Respondent says, are so clearly answered by the Kentucky law and the Kentucky court rules, the constitutional error involved in such state law answers may be noticed and reviewed under this Court's

"plain error" doctrine. Under that doctrine, this Court "at its option, may notice a plain error not presented" by the parties either in the court below or before this Court. Rule 40(1)(d)(2); see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 320, n.6; *Vachon* v. *New Hampshire,* 414 U.S. 478, 479, n.3.

But this alternative "plain error" doctrine need not be invoked here, since the parties are now in agreement that the federal constitutional issues were raised in and denied by the Court of Appeals of Kentucky, and in light of the federal questions in the Petition the parties are prepared to brief and argue fully the federal constitutional issues.

II

As to the federal constitutional questions at stake, the Respondent concedes (Opp. Br. 15) that the Board of Governors could have finally dismissed the charges against Petitioner, in which event "the case would have terminated without any detriment to petitioner." That power of final termination is precisely why Petitioner should have been given some due process opportunity to urge that the Board so terminate the case. As the Respondent further concedes (Opp. Br. 17), "There is no 'hearing' before the Board."

As to the absence of any kind of evidentiary hearing before the Court of Appeals, the Respondent offers the novel theory (Opp. Br. 16) that "case law" dealing with federal due process requirements "are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court. . ." If that theory exists,

it certainly is not supported by any decision of this Court. Advancing such a theory merely adds to the substantiality of the due process question and the appropriateness of granting certiorari.

The analogy drawn by Respondent (Opp. Br. 16-17) to disciplinary proceedings before this Court pursuant to Rule 8 also adds fuel to the certiorari fire in this case. The analogy seems faulty if for no other reason than that disbarment by the Kentucky court directly affects the reputation and livelihood of the attorney involved, whereas disbarment by this Court is merely superimposed upon the more drastic state court disbarment—or, indeed, it might be quite independent of state court disbarment and in no way affect the livelihood of the attorney. The due process implications of the disbarment procedures in Kentucky and those before this Court would thus appear significantly different.

It should be noted that presently pending before this Court for decision is No. 74-204, *Mathews* v. *Eldridge,* argued on October 6, 1975. In that case a beneficiary of Social Security disability benefits was given the right to rebut in writing a proposed termination of benefits and to submit additional evidence, but was denied the right to an oral hearing on such termination. The due process right to an oral hearing in that case bears strong overtones to the instant claim that due process requires some sort of an oral hearing before the Kentucky Court of Appeals on the proposed disbarment.*

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* Respondent asserts (Opp. Br. 18) that Petitioner never requested an oral argument and that there is no rule prohibiting him from so requesting. But Respondent fails to state that there is no rule authorizing an oral argument on request, and that in fact the Court of Appeals has never held an oral argument on a disbarment case. Any such request would have been futile.

III

Finally, the Respondent fails to explain how the Court of Appeals of Kentucky could have found or inferred from the "uncontroverted facts" that the Petitioner "converted his clients' funds to his own use"—which was the critical finding that underlay the disbarment order.

While this is not the forum to retry or review the facts justifying the disbarment order, it is pertinent to note the factual insufficiency underlying the order as an example of the injury that can flow from a denial of a full due process hearing before the Kentucky court.

The only incidents of record concerning Petitioner's dealings with his clients' money were summarized in the Trial Committee's findings (Petition, 9a-10a, Findings 1, 2, and 3). In each of those three incidents, the Petitioner issued one or more checks that were temporarily dishonored. But in each of those three incidents, the Trial Committee found that the client ultimately lost no money and the Court of Appeals did not find otherwise. To wit:

> 1. "The check from the Respondent [Petitioner herein] to Mr. Taylor was dishonored when first presented for payment, but later honored." Petition, 9a.
>
> 2. "The mortgage was paid by Respondent and Mr. Pappas lost no money thereby." Petition, 10a.
>
> 3. "... this check was returned to Mr. Lewis because of insufficient funds being in the account of the Respondent, but later this check was honored." Petition, 10a.

Had Petitioner been given some kind of an oral hearing before the Court of Appeals, dealing with the

evidence and any proposed fact findings of the court, Petitioner might well have convinced the court that such temporarily dishonored checks, however negligently issued, did not and could not result in a conversion of the clients' funds. To impose the drastic sanction of permanent disbarment because of an unproved conversion heightens the need for subjecting Kentucky's disciplinary procedures to the basic demands of procedural due process.

CONCLUSION

For these additional reasons, the Petition should be granted and the judgment below reviewed.

Respectfully submitted,

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